

# BEST PRACTICES FOR WATER QUALITY TRADING

## JOINT REGIONAL AGREEMENT

### **Discussion Guide, August 8<sup>th</sup>, 2013**

This Discussion Guide is intended to provide definitions, context, analysis, and options for addressing various components of water quality trading programs (e.g. trading ratios, BMP quality standards). It poses questions that will be discussed at the interagency workshops. This document may reference other trading programs, examples, or documents, but is not intended to serve as a published report or white paper and thus will not be extensively cited. This document will be included in the workshop packet and posted online following each workshop.

### **5.11 Sample Agreements**

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As we move closer to a draft set of Best Practices for water quality trading in November 2013, we should begin thinking about how we want to capture the points of consensus/agreement across the agencies. We should also think what kinds of agreements and/or endorsements we may want to work toward in 2015 after the pilot testing period. As you read through some of the sample agreement examples we have identified below, please consider of some of the following questions:

- Given that the JRA is a set of recommended best practices for water quality trading (i.e., non-binding as to principles or practices), what is the appropriate level of agreement formality through which to document the JRA work and the agency's opinions of it?;
- Which aspects of the below example agreements, if any, seem to be most appropriate for documenting the JRA process and outcomes?
- If a statement/agreement is generated from the JRA process, what affirmative statements/content would your agency want to see included?
- What caveats, if any, would your agency require? What deal breakers would prevent your agency from formally documenting the JRA process and outcomes?
- What length of time should any statement/agreement cover (e.g., the duration of a 2-year pilot? Through the pilot process, with an option/obligation to reconvene at a particular point)?

This section provides an annotated list of existing, relevant interstate agreements and other collaborative documents and memorandums of agreement (MOU) in the Pacific Northwest and beyond. Most, but not all, are related to water quality trading. This list is intended to serve as a starting point for agencies' contemplation of what the JRA's final form may take, and is not intended to limit or prescribe the method through which agencies may formalize the discussions and framework development they have been engaged in to date.

## 1. INTERSTATE AGREEMENTS:

Interstate agreements are voluntary arrangements between two or more states. These agreements can range from aspirational/endorsement agreements (usually no binding affect) to agreements to undertake a particular project (binding as to that project, but not creating other binding affects) to interstate compacts/formal contracts (once approved, become binding law as to the signatory states).

### ***A. Pilot Trading Plan 1.0 for the Ohio River Basin Interstate Water Quality Trading Project***

The Pilot Trading Plan 1.0 is a voluntary agreement that formalizes the collaborative efforts of Ohio, Indiana, and Kentucky to establish the first interstate trading framework in the United States. Electric Power Research Institute is a partner in this effort. To date, it is the most comprehensive and clearly delineated multi-state agreement on trading.

Available: <http://www.farmland.org/documents/ORBTradingPlan8-6-12V2FINAL.pdf>

- Form and Signatories: Agreement to support pilot projects. Ohio, Indiana, Kentucky.
- Effective: August 2012, with pilots through 2015.
- Pages: 36. 10 for the agreement, with 26 pages of addenda on project history, maps, modeling summaries, template trading language for NPDES permits, validation and verification protocols, and letters of support from ORSANCO, USDA, and EPA, among others
- Content: The agreement sets forth an initial framework for trading total phosphorous and total nitrogen. It describes how water quality standards must be met, disallows trading to meet categorical TBELs, and allows a credit generated in one state to be applied in another. The agreement also details which models may be used, how models may be tested, and provides incentives for early credit trading. Credit registration and tracking are mentioned, but states are to agree on systems at a later date. A reserve pool is established at 10% of total credits.
- Relevance to JRA: During the JRA process, agencies have expressed interest in testing the methods and practices discussed. Should agencies wish to do so through pilot programs where information can continue to be refined and shared, and in a way that might provide for continuity of programmatic development, then an agreement similar to the Ohio Basin states' pilot might be helpful to use in providing structure around such pilots.

### ***B. Chesapeake Bay Program Nutrient Trading Fundamental Principles and Guidelines***

The Nutrient Trading Fundamental Principles and Guidelines is a best practices document developed by the Chesapeake Bay's Nutrient Trading Negotiation Team over a period of approximately two years. As it contains guiding principles, trading definitions, and general principles that the signatory states could use as a reference as they pursued trading within their boundaries, this Guidelines document is most analogous to the form that agencies and others first envisioned for the Joint Regional Agreement in the 2012 USDA CIG application.

Available: [http://www.chesapeakebay.net/content/publications/cbp\\_12268.pdf](http://www.chesapeakebay.net/content/publications/cbp_12268.pdf)

- Form and Signatories: State endorsement of nonbinding guidance. Virginia, Maryland, Pennsylvania, District of Columbia, Chesapeake Bay Commission.
- Effective: March 2001
- Pages: 87. Appendices on public comment, definitions, trading ratios, retirement, and uncertainty, and trade administration options consist of 44 of these pages.
- Content: The document, in the form of guidance and recommendations developed by the Chesapeake Bay Program Nutrient Trading Negotiation Team, is not intended to be binding or prescriptive. The document, however, went through public notice, meetings, and comments; through this process, definitions, principles, guidelines, and implementation options were developed for “identifying nutrient reduction goals, determining eligibility, performing trade administration, ensuring accountability, assessing progress, and involving stakeholders.”<sup>1</sup> Though the agreement pre-dates EPA’s 2003 Trading Policy, many program elements, such as third party verification, feedback loops in predicting credit performance, and form tracking mechanisms, are consistent with and/or exceed the later federal recommendations.
- Relevance to JRA: If agencies wish to memorialize the best practices discussions and general framework elements developed over the course of the year, such an agreement form could also prove effective and instructive.

### C. *Joint Statement of Agreement for an Ecosystem Credit Accounting System*

In 2009, more than two dozen federal and state agencies, along with several leading municipalities and nonprofit organizations, signed onto a joint statement of support to pilot and test a credit accounting system in Oregon, the *Pilot General Crediting Protocol: Willamette Basin Version 1.0*.

Available: <http://willamettepartnership.org/ongoing-projects-and-activities/nrcs-conservation-innovations-grant-1/Joint%20Agreement%20all%20signatures.pdf>

- Form and Signatories: Joint Statement of support. Office of Governor Ted Kulongoski, U.S. Army Corps of Engineers, USDA Forest Service, Oregon Department of State Lands, Oregon Watershed Enhancement Board, Institute for Natural Resources, Oregon Department of Forestry, Mud Slough Wetland Mitigation Bank, Willamette Partnership, Ecotrust, Defenders of Wildlife, Oregon Department of Land Conservation & Development, NOAA Marine Fisheries Service, USDA Natural Resources Conservation Service, Cascades West Council of Governments, Clean Water Services, City of Albany, The Nature Conservancy, U.S. EPA – Region 10, Oregon Department of Transportation, Oregon Department of Agriculture, Oregon Department of Environmental Quality, The Freshwater Trust, Oregon Department of Fish & Wildlife, City of Eugene, U.S. Fish & Wildlife Service
- Effective: September 2009

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<sup>1</sup> Nutrient Trading Fundamental Principles and Guidelines at 12.

- Pages: 5.
- Content: The joint statement created a pilot credit trading process, effective September 2009 to September 2011, which applied credit calculation protocols for wetlands, salmon habitat, upland prairie, and water temperature to projects in Oregon. The statement memorialized agencies' and organizations' intent to collaborate on standardizing the functional assessments of ecosystem performance and easing red tape that might otherwise delay such processes. In addition, the statement was intended to facilitate the sale of multiple types of credits from single restoration projects.
- Relevance to JRA: Such a time-limited pilot might similarly be useful for testing and implementing the outcomes of the JRA process.

#### ***D. Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities***

While the timing of ratification, implementation, and content of the Restoration Agreement remain a controversial issue in the public sphere, the structure, language, and form of the 2010 Agreement are direct and allocate clear roles and responsibilities to the signatory agencies.

Available:

<http://216.119.96.156/Klamath/Klamath%20Basin%20Restoration%20Agreement%202-18-10signed.pdf>

- Form and Signatories: Binding agreement. California Natural Resources Agency, California Department of Fish and Game, State of Oregon, Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Water Resources Department, Karuk Tribe, Klamath Tribes, Yurok Tribe, Del Norte County, Humboldt County, Klamath County, Siskiyou County, Ady District Improvement Company, Collins Products, LLC, Enterprise Irrigation District, Don Johnston & Son, Inter-County Properties Co., American Rivers, California Trout, Institute for Fisheries Resources, Trout Unlimited, Salmon River Restoration Council, Pacific Coast Federation of Fishermen's Associations, and many other improvement and irrigation districts.
- Effective: February 2010, lasting for a term of 50 years.
- Pages: 378, with appendices on scheduling, legislative language, coordination, and technical management beginning on page 172 through the end of the agreement.
- Content: Its framework begins with goals and reservation of rights and legal responsibilities, segues into support and implementation for the agreement, discusses funding contingencies and budgets, coordination and oversight, and then concludes with traditional miscellaneous contract provisions before transitioning into programmatic appendices.
- Relevance to JRA: Should participating JRA agencies contemplate a more formal agreement to achieve trading goals, including through possible later adoption of implementing regulations and law, this Agreement's structure and language would be of use. The Agreement also provides a mechanism for other entities to later sign on to the

principles and provisions, should JRA agencies wish to provide other states with such an opportunity in the future.

## **2. MEMORANDUMS OF AGREEMENT:**

Memorandums of Agreement (MOA) and Memorandums of Understanding (MOU) are bi- or multi-lateral agreements that essentially serve as a statement of intent to collaborate between the signatory parties. These documents often identify common goals, describe the relationships that the signatories expect/hope will occur, and outline an expected pathway toward that goal. MOAs and MOUs have varying degrees of binding affect, depending on the intent of the signatories, but are usually considered non-binding.

### **A. *Memorandum of Understanding Re: Cooperative Efforts for the Protection of the Chesapeake Bay and Its Rivers***

The Cooperative Efforts MOU describes the states' intent to work collaboratively to address the primary forms of pollutants in the Chesapeake Bay by 2010. Though efforts to achieve a clean Chesapeake Bay by 2010 were clearly not successful and the agreement contains little specificity on how goals were to be achieved, the agreement served as a precursor to later trading guidelines and collaborative efforts between the states and agencies.

Available: [http://www.chesapeakebay.net/content/publications/cbp\\_12085.pdf](http://www.chesapeakebay.net/content/publications/cbp_12085.pdf)

- Form and Signatories: MOU. Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, West Virginia, U.S. Environmental Protection Agency (US EPA)
- Effective: June 2002
- Pages: 2
- Content: The MOU acknowledges that unless the Chesapeake Bay is brought into compliance with water quality standards by 2010, a TMDL will be established by May 2011. Accordingly, the states agreed upon their mutual responsibility for the health of the watershed and agreed to expand upon interstate agreements, cooperative implementation, and effluent trading in order to bring health back to the waterways.

### **B. *The Lower Boise River Effluent Trading Demonstration Project Memorandum of Understanding***

The Lower Boise Effluent Trading MOU sets forth a cooperative framework between US EPA, Idaho DEQ, and the Idaho Soil Conservation Commission (SCC) to oversee the implementation of nonpoint source participation in Lower Boise River effluent trading.

Available: [http://www.deq.idaho.gov/media/565975-water\\_lower\\_boise\\_river\\_effluent\\_trading\\_demonstration\\_project\\_2001\\_131.pdf](http://www.deq.idaho.gov/media/565975-water_lower_boise_river_effluent_trading_demonstration_project_2001_131.pdf)

- Form and Signatories: MOU. US EPA, Idaho DEQ, and Idaho Soil Conservation Commission (SCC).

- Effective: April 27, 2001
- Pages: 7.
- Content: As EPA is responsible for NPDES permitting, Idaho DEQ implements water quality standards and monitors point sources, and the SCC engages in cost-share programs to incentivize best management practices (BMP), the three entities entered into an MOU for five years to delineate each entity's responsibilities in implementing the Lower Boise River TMDL. At the request of EPA and DEQ, the SCC was to conduct on-the-ground BMP effectiveness monitoring to assess credit validity and verify performance. EPA and Idaho DEQ retained their role in review and oversight of records and sites, with SCC reporting trading non-compliance (e.g., contract breach or BMP failures) and taking the lead in remedying any BMP performance deficiencies as needed.
- Relevance to JRA: In this JRA context, such an agreement might be useful in reviewing how agencies and other organizations active in the trading space could develop collaboration around or apportion responsibility for monitoring and enforcement.

### C. *Idaho DEQ and Idaho Dairymen's Association, Inc. Memorandum of Understanding*

The MOU between Idaho DEQ and Idaho Dairymen's Association (IDA) is not trading-related, but outlines a mechanism between two parties – one a state, one a non-profit organization – to collect and exchange data on ground water monitoring. Such an MOU framework could serve as a basis for exchanging information between states or among states and organizations working in the water quality trading field.

Available: <http://www.deq.idaho.gov/media/919007-ida-deq-mou-2012.pdf>

- Form and Signatories: MOU. Idaho DEQ and Idaho Dairymen's Association.
- Effective: November 2012.
- Pages: 2.
- Content: The objective of the MOU is to meet bi-annually to discuss and share data and analysis of the environmental impacts of Idaho dairy farms, as well as exchange comments and information on other agreements or use and collection of information.
- Relevance to JRA: Though the subject material of this MOU is unrelated to water quality trading, the ongoing collaboration, set schedule of meetings, and exchange of information around agreements and collection of data could be used as a sample in developing a framework for agencies' exchange of best practice information among themselves or with others.